

OCT 26 1977

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-491

MORRIS B. MYERS,
Petitioner,

v.

JOSEPH M. BUTLER and ELLSWORTH E. EVANS,
Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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Statutes

28 U.S.C. § 1652:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as the rules of decision in civil actions in the courts of the United States, in cases where they apply 8

SDCL § 22-38-3:

If any person being a trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or being otherwise entrusted with or having in his control property for the use of any other person or persons or for any public or benevolent purpose, fraudulently appropriate it to any use or purpose not in due and lawful execution of his trust, or secretes it with the fraudulent intent to appropriate it to such use or purpose, he is guilty of embezzlement 3, 6, 8, 9, 10, 14

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SDCL § 54-8-22:

Every person who, being a party to any conveyance or assignment of any property, or of any interest therein, made or created with intent to defraud prior or subsequent purchasers, or to delay or defraud creditors or other persons, and every person being privy to or knowing of such conveyance, assignment, or charge, who willfully puts the same in use as having been made in good faith, is guilty of a misdemeanor. . . 4, 41

Miscellaneous

74 Am.Jur.2d Torts, § 46 13

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PRELIMINARY STATEMENT

The transcript of the trial in U. S. District Court will be designated by the letters "TR". The transcript in the case of State of South Dakota v. Morris B. Myers, trial exhibit No. 2, will be designated by the term "Zick TR". The transcript of the guilty plea entered by petitioner before Judge Hersrud, trial exhibit No. 10, will be designated by the term "Plea TR". The petition for writ of certiorari on file herein shall be designated by the abbreviation "Pet."

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. "A") is reported at 556 F.2d 398.

JURISDICTION

The judgment of the Court of Appeals was entered May 2, 1977. A petition for rehearing was denied on June 28, 1977. (Pet. App. "C"). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether respondents' motion for a directed verdict at the close of petitioner's case was properly granted by the United States District Court Judge.
2. Whether a criminal defendant who claims to have knowingly agreed with his counsel to misrepresent facts to a court in connection with the entry of a guilty plea can sue for damages allegedly sustained by reason of the failure to obtain the object of the misrepresentation.

STATEMENT OF THE CASE

This is a professional malpractice suit against respondents arising out of their defense of petitioner, who was charged in state court in South Dakota with a number of criminal offenses. Suit was commenced by the filing of a summons and complaint on November 7, 1975, in the United States District Court for the District of South Dakota, Western Division. Federal juris-

diction was based upon diversity of citizenship. Trial by jury commenced before the Honorable Ronald N. Davies, visiting District Court judge, on August 9, 1976, at Rapid City, South Dakota. A directed verdict in favor of respondents was entered at the close of petitioner's case on August 11, 1976. Petitioner's appeal to the Eighth Circuit Court of Appeals was denied as was his petition for rehearing. The case is now before this court pursuant to petition for writ of certiorari.

Petitioner was admitted to practice law in South Dakota in January of 1957, and engaged in the law practice at Aberdeen, South Dakota, from that date until his disbarment on May 10, 1973. (TR 2) Respondents, Evans and Butler were admitted to practice law in South Dakota in 1928 and 1954, respectively, and are both still actively engaged in practice. (TR 39, 165)

In October, 1972, the grand jury in and for Brown County, South Dakota, returned indictments charging petitioner with nine separate criminal violations (TR 46, 117) The indictments charged petitioner with embezzlement of a client's funds, bribery, receiving stolen property, grand larceny, embezzlement from a decedent's estate and transferring property in fraud of creditors from a bankrupt company. (TR 77, 89, 90, 101, 111-114, 117-124) It was these indictments that respondents were retained to defend by petitioner and two other persons named Wetzler and Gorder, who were also charged in a part of the indictments along with petitioner. (TR 48)

On April 12, 1973, petitioner was found guilty by a jury of embezzlement of the funds of Mrs. Jeanette Zick Dennart in violation of SDCL §22-38-3. (Zick TR 207) A directed verdict of not guilty was entered as to count two of the Zick indictment. (Zick TR 184-196) On May 7, 1973, petitioner was sentenced to two years' imprisonment. Petitioner was tried and acquitted of the bribery charges in May of 1973. On October 23, 1973, petitioner plead guilty to transferring property with

intent to defraud creditors in violation of SDCL §54-8-22. (Plea TR 22) Petitioner was sentenced to serve one year to run concurrently with the prior two year sentence. (Plea TR 31, 32) Pursuant to a plea bargain the remaining charges were dismissed following the entry of the guilty plea. (TR 18)

The embezzlement conviction in the Zick case was affirmed on direct appeal to the Supreme Court of South Dakota, which appeal was prosecuted by respondents. *State v. Myers*, 220 N.W.2d 535 (S.D. 1974). Petitioner served just over five months in prison. (TR 17) Petitioner filed a petition pursuant to SDCL §23-52 seeking post-conviction relief from the Zick conviction in Circuit Court, Third Judicial Circuit, South Dakota. (Appendix "A") The petition was denied after an evidentiary hearing by Circuit Court Judge Cheever. (Appendix "B") Petitioner's petition for probable cause for appeal from Judge Cheever's opinion was denied by Justice Winans of the South Dakota Supreme Court. (Appendix "C") Petitioner has not proceeded through post-conviction proceedings to attempt to set aside the conviction based upon his plea of guilty.

Petitioner's amended complaint upon which this matter was tried set forth two theories for recovery. (Docket Entry No. 22) The first theory, set forth in paragraphs 3-6, is based entirely upon petitioner's allegation that the money claimed to have been embezzled came to him as a loan and therefore he was entitled as a matter of law to a directed verdict of acquittal in the Zick case. (TR 4-6, 8-10, 12, 13, 21, 22, 27, 28, 138-144, 147-149, 181, 182) Throughout the proceedings petitioner contended that the issue relating to the alleged failure to discover and assert the loan defense was a matter of law for the court. (TR 4-6, 12, 13, 21, 22, 27, 28, 138-144, 147-149, 181, 182, Docket Entries Nos. 35, 37) Petitioner's second theory for recovery relates to the guilty plea. Petitioner alleged that respondents warranted that if petitioner, although innocent, would plead guilty to the charge of transferring property to de-

fraud creditors, he would not be sentenced to prison. (Docket Entry No. 22)

At the close of petitioner's evidence in this case no evidence of negligence on the part of respondents had been presented. Further, no expert testimony had been offered to establish the applicable standard of care to be applied or any deviation therefrom. Respondents' motion for a directed verdict was properly granted and the judgment in their favor properly sustained on appeal.

ARGUMENT

1. Petitioner Contends That if Respondents Had Asserted the Defense in His State Court Embezzlement Trial That the Money Claimed to Have Been Embezzled Came to Him as a Loan, and Thus Could Not Have Been the Subject of Embezzlement, a Directed Verdict of Acquittal Would Have Been Granted as a Matter of Law.

Petitioner contends that respondents failed to discover and present the "loan defense" in the state court proceedings and that said defense would have resulted in acquittal. However, the state court opinions rendered by the South Dakota Supreme Court on direct appeal of the embezzlement conviction and the South Dakota Circuit Court and Supreme Court in post-conviction proceedings clearly reflect that the "loan defense" was asserted by respondents at the original state court trial and on direct appeal to the South Dakota Supreme Court and that the assertion of said defense would not result in acquittal as a matter of law. Thus, petitioner's claims that the Eighth Circuit Court of Appeals decided an issue of state law contrary to the laws of South Dakota and that the Eighth Circuit Court of Appeals' decision so far departed from accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision are totally without merit.

On April 12, 1973, petitioner was found guilty by a jury in Third Judicial Circuit Court, County of Brookings, State of South Dakota, of the crime of embezzlement in violation of SDCL § 22-38-3. SDCL § 22-38-3 provides as follows:

"If any person being a trustee, banker, merchant, attorney, agent, assignee in trust, executor, administrator, or collector, or being otherwise entrusted with or having in his control property for the use of any other person or persons or for any public or benevolent purpose, fraudulently ap-

propriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with the fraudulent intent to appropriate it to such use or purpose, he is guilty of embezzlement."

A portion of the facts supporting the embezzlement conviction are summarized by the South Dakota Supreme Court in its opinion as follows:

"The parties in a divorce action, Mr. and Mrs. Zick, called on Mr. Myers to get the divorce. The husband was to pay for the legal services, and defendant Myers was to get the divorce for Mrs. Zick. Certain United States Savings Bonds, property of Mrs. Zick, registered in the names of Herman Weismantel, P.O.D. Mrs. Jeannette Zick, were discussed. The defendant told Mrs. Zick that the value of the bonds would bring a better rate of interest if they were cashed and invested in something else. Mrs. Zick was requested by defendant to endorse the bonds which she did. The defendant then took the bonds so endorsed to a local bank for redemption, and the bank sent them in to the Federal Reserve Bank. The defendant on the strength of the bonds and his personal note borrowed from the bank the amount of the redemption value in the sum of \$4,035.60 which he deposited in his own personal account. The defendant gave his personal note to the bank. He told the banker that he needed the money that day so that he could give the money to Mrs. Zick because of her financial condition. Defendant asked the banker if he could borrow the money, then when the proceeds were received, to apply "those against the note to pay it off." This is what was done, and when the proceeds of the redeemed bonds were returned to the bank, the note signed by defendant was canceled as paid in full. The bank endorsed the check from the treasurer of the United States with a credit and guaranteed the endorsement. It was not endorsed by Mrs. Zick." *State v. Myers, supra* at 537.

Petitioner claimed at the embezzlement trial that he had purchased for Zick a Contract for Deed paying a suitable rate of return. (Zick TR 103-105, 119, 127) However, the evidence demonstrated that the money in question had been deposited to his personal account and drawn upon almost immediately. (Zick TR 138-140) In fact, without the deposit of the Zick funds, Petitioner's personal account would have been overdrawn substantially. (Zick TR 138-140) The deed for the transfer of the property subject to the Contract for Deed to Zick was not signed until long after withdrawals on the money had been made. (Zick TR 107, 124) The deed was never delivered to Zick nor did she receive any of the income from the contract payments. (Zick TR 134, 135) Indebtedness of the prior owner of the subject property to petitioner was satisfied as a result of the alleged transfer. (Zick TR 102-107, 112) Zick testified that she knew nothing of the cashing of the bonds until several months after they were cashed and that she was never advised of the alleged purchase of the mortgaged property. (Zick TR 14, 16, 17)

Petitioner asserts that because he signed a personal note to obtain the money from the bank the money came to him as a loan and he cannot, as a matter of law, be guilty of violating SDCL § 22-38-3. It is the alleged failure of respondents to ascertain and assert this legal defense that is the basis for petitioner's claims. The issue presented is clearly one of construction of SDCL § 22-38-3, a question of law, and does not involve federal constitutional questions. Therefore, it is respectfully submitted that the decisions of the state courts of South Dakota dealing with the very issue presented in this case are dispositive and controlling on this court. *Walker v. Kruse*, 484 F.2d 802, 805 (7th Cir. 1973); *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), 28 U.S.C. § 1652; *Mullaney v. Wilbur*, 421 U.S. 690, 691 (1975); *Francia v. Rodriguez*, 371 F.2d 827 (10th Cir. 1967).

At the Zick trial a motion for directed verdict was made on behalf of petitioner on the basis that the evidence "fails to show any felonious or unlawful fraudulent appropriation of the money of the complaining witness, Jeanette Zick." (Zick TR 180) In *State v. Myers*, supra, the South Dakota Supreme Court was presented with the following question: "Does the record support the conviction of defendant (petitioner) of the act and intent necessary to constitute embezzlement?" This question presented at trial and on review is the identical question posed by the petitioner in this case. The South Dakota Supreme Court held that conviction under SDCL § 22-38-3 was proper. In the case of *Morris B. Myers, Petitioner, v. State of South Dakota, Defendant and Respondent*, in Circuit Court, Third Judicial Circuit, a post-conviction proceeding under SDCL § 23-52, the exact questions presented in the allegations of petitioner's complaint in the United States District Court were presented to South Dakota Circuit Judge Cheever. (Appendix "A", "B")

Judge Cheever determined that petitioner's claim that as a matter of law he could not have been found guilty because the money came to him as a loan was without merit. The following quotation from Judge Cheever's memorandum opinion is particularly appropriate in this case:

In connection with Point No. 1 of the petition herein, basically it is the Petitioner's contention therein that the conviction was obtained without relevant evidence that the money involved came into his possession by virtue of an attorney-client relationship or that he converted or misappropriated the money. It is his contention that under the circumstances presented that the money came into his possession, not as an attorney, but as a borrower from the bank and that the Petitioner became a debtor of the bank and could not be guilty of embezzlement of money that belonged to him.

In the appeal in this case, a report of which can be found in 220 N.W.2d 535, one of the assignments of error raised by the Defendant-Petitioner in that case was the following:

'Does the record support the conviction of the Defendant of the act and intent necessary to constitute embezzlement?' In connection therewith, the court, at page 537, made the following statement:

'The section defining the embezzlement charged here is covered by SDCL 22-38-3, and whether or not the acts of the Defendant were sufficient to come within the purview of that particular section is largely a fact question. Fact issues are peculiarly within the province of the jury where there were two different versions of those acts. The State gave its version and the defendant gave his. It appears that the jury accepted that given by the state and rejected that given by the defendant.'

In post-conviction proceedings, the Petitioner has developed no new factual situation but has suggested in his brief that as a matter of law he could not be held to be guilty of embezzlement under the facts given and testified to at trial, even accepting the State's version The Court fails to see where Petitioner has raised anything except an issue of law which was developed both at the trial and on review by the Supreme Court It is therefore, the Court's opinion that the Defendant has failed to sustain the burden on Point No. 1 of his petition." (Emphasis supplied.) (Appendix "B")

The facts in the Zick case do support a finding by the jury that the proceeds of the bonds came into petitioner's hands for the use of Mrs. Zick and were fraudulently appropriated by petitioner to a purpose not in the execution of his trust. In the Zick case petitioner was not given a loan, but obtained the

money on the basis of Mrs. Zick's bonds and for use on her behalf only. In any event, the question of construction of the particular embezzlement statute involved is one for the state courts of South Dakota.

A final basis upholding the directed verdict with reference to petitioner's claim based on the Zick case is that even assuming that the "loan defense" was not presented, the failure to present a defense in a criminal action that as a matter of law could not have prevailed cannot be said to constitute malpractice. *Martin v. Hall*, 20 Cal.App.3d 414, 97 Cal. Rptr. 730, 733-735, 53 ALR3d 719 (Cal. 1971).

2. Petitioner Contends Without Supporting Authority or Argument That an Accused Who Has Affirmatively Misrepresented Facts to the Court Accepting His Plea Regarding His Guilt and the Nature and Extent of Promises or Inducements Made to Secure Entry of the Plea Is Entitled to Sue for Damages Allegedly Sustained by Reason of the Failure to Obtain the Object of the Misrepresentation Made.

On October 23, 1973, petitioner plead guilty to conveyance of property to defraud creditors in violation of SDCL §54-8-22. The guilty plea was entered before Circuit Judge Hersrud. A one-year sentence was imposed by Judge Hersrud and directed to run concurrently with the prior two-year sentence entered on the embezzlement conviction. (Plea TR 31, 32) Petitioner alleges in paragraph 7 of his second amended complaint that respondents warranted that no prison term would be imposed if a guilty plea were entered although they knew he was not in fact guilty of the crime charged. (Docket Entry No. 22) The detailed record made by Judge Hersrud at the time of the entry of the guilty plea, a part of which is quoted in the opinion of the Eighth Circuit Court of Appeals, demonstrates conclusively that said allegation is totally without merit.

Petitioner is a law school graduate and practiced law in Aberdeen, South Dakota, from 1957 through 1972. That petitioner was fully advised and fully aware of his rights at the time of the entry of the guilty plea in question is clearly demonstrated by the transcript of the plea. In addition, in petitioner's partial answers to respondents' interrogatories in this action, petitioner provided the following answer to the following question:

Question 30(g): State whether you understood at the time of the entry of your plea of guilty the legal consequences thereof insofar as said plea constitutes a waiver of right to trial and the constitutional safeguards attendant thereto.

Answer: I did so understand. (Docket Entry No. 18)

Petitioner was fully aware of his rights and has expressly advised and acknowledged that he realized that the recommendation of probation by the state was not binding on the trial court. In the face of the record made at the time of the plea it stretches all reasonable bounds of credibility for petitioner to contend that he was not aware that Judge Hersrud had the power to disregard the plea bargain and impose a prison term.

Petitioner repeatedly denied before Judge Hersrud that any promises had been made to him as to what the sentence imposed would be. Petitioner's allegation in paragraph 7 of his complaint requires that the court find that petitioner knowingly and intentionally misrepresented facts to Judge Hersrud before it can be considered as a basis for relief. Indeed, in answer to respondents' Interrogatory No. 30(h), petitioner answered as follows:

"Prior to the sentencing Butler and I conferred concerning the manner of proceeding, it was agreed by both of us that in view of the rule requiring the court to make a factual determination I could not tell the truth because

there had not been a transfer to defraud creditors and that questions from the court regarding intent could not be answered truthfully; it was also agreed between us that I would have to falsely deny the existence of a deal." (Docket Entry No. 18)

A holding that one who claims to have willfully and knowingly misrepresented facts to a court can seek damages because the object of the misrepresentations was not obtained would clearly be contrary to law and public policy. 74 Am.Jur.2d Torts §46. That "anyone who engages in a fraudulent scheme forfeits all right to protection either at law or at equity" is clearly the law of the Eighth Circuit. *Kansas City Operating Corporation v. Durwood*, 278 F.2d 354, 356 (8th Cir. 1960).

3. No "Special and Important Reasons" for Granting a Writ of Certiorari Within the Meaning of Rule 19 of the Supreme Court Rules Are Presented in This Case.

Rule 19 of the Supreme Court Rules provides in part as follows:

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

To satisfy the requirements of Supreme Court Rule 19, the issues presented must be of importance to the public as opposed to the parties and must present "a problem beyond the academic or episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

In the instant case the major thrust of petitioner's claim of professional malpractice is based on the alleged failure of respondents to discover and present the "loan defense" as set forth hereinabove. Petitioner alleges that assertion of said defense

would result in acquittal as a matter of law under South Dakota law. Thus, petitioner claims that the Eighth Circuit Court of Appeals "decided an important state question in conflict with applicable state law, and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the trial court as to call for an exercise of the court's power of supervision." (Pet. at p. 2)

The fallaciousness of such claims becomes apparent when considered in light of the fact that the South Dakota courts have ruled repeatedly that the assertion of the "loan defense" did not and will not result in acquittal as a matter of law. The South Dakota courts have held that SDCL § 22-38-3 covers the acts of petitioner as proven by the evidence presented in his embezzlement trial. Thus, petitioner's claim that the Eighth Circuit Court of Appeals decided an important state question in conflict with state law is based on petitioner's view that not only the federal courts misapprehended South Dakota law, but that the South Dakota courts have done the same.

The issue of whether under the facts and circumstances proven in the Zick trial petitioner could be convicted of embezzlement under the provisions of SDCL § 22-38-3 is not an issue of public importance. The scope and definition of SDCL § 22-38-3 is a question of state law and has been decided by the South Dakota courts contrary to petitioner's view of what the law ought to be. The fact that the case involves a claim of professional malpractice is no automatic qualification for certiorari review and petitioner's claim that the Court of Appeals acted in deference to respondents and in disregard of justice is absurd. The ruling of the Court of Appeals is proper and the petition for writ of certiorari must be denied.

CONCLUSION

Based upon all of the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

Defendant's Exhibit A

• State of South Dakota }
County of Brookings }^{ss}

In Circuit Court Third Judicial Circuit

Morris B. Myers,

vs.

State of South Dakota,
Defendant and Respondent.

Petitioner,

} CIU 75-5076

Petition

(Post-Conviction)

Petitioner above-named, respectfully petitions the above-named court and represents as follows:

1. That on May 7, 1973, in proceedings held in the above-named court, petitioner was convicted upon jury verdict of the crime of embezzlement; that judgment and sentence thereon was rendered by the terms of which petitioner was sentenced to serve a term of two years in the South Dakota State Penitentiary;

2. Petitioner incorporates herein by this reference all papers, files, records and transcripts of testimony and court proceedings filed in the office of the clerk of the above-named court in said embezzlement proceedings;

3. That said judgment and sentence was imposed in violation of the Constitution and laws of the United States and of the State of South Dakota;

4. That in other proceedings instituted to enforce against petitioner a penalty or forfeiture, to-wit, the suspension or revocation of petitioner's license to practice law within the state of South Dakota, a hearing was held of and concerning the facts and circumstances identical to those upon which petitioner's conviction is based; that a true, correct, and complete transcript of said proceedings is hereunto annexed and by this reference incorporated herein; that at the time of said proceedings and prior thereto, and without petitioner's knowledge or the knowledge of petitioner's counsel thereat, petitioner was the subject of other proceedings including the said embezzlement investigation and prosecution at the time being conducted by the Attorney General of the State of South Dakota; that at or prior to said proceedings neither petitioner nor his said counsel was informed that petitioner was the subject of said embezzlement investigation and prosecution, and petitioner was not informed of his right to remain silent and of his privilege against self-incrimination; that petitioner testified in said proceedings and such evidence and testimony thus illegally obtained was thereafter introduced against petitioner at petitioner's trial upon said charge of embezzlement; that petitioner did not knowingly and voluntarily waive his constitutional rights and privileges at said proceeding.

5. That petitioner's indictment and trial upon said charge of embezzlement and delay thereof, were occasioned by the State of South Dakota intentionally and with purposeful and deliberate design for delay, with no legitimate reason, for the purpose of obtaining a tactical advantage over petitioner and of trapping petitioner, all to petitioner's prejudice in that, among other prejudices, by such ruse and deception on the part of the State of South Dakota as hereinabove described, petitioner

testified fully and completely at the said proceedings to suspend or revoke petitioner's license to practice law without being informed of his right to remain silent and of his privilege against self-incrimination, which right and privilege petitioner did not knowingly and voluntarily waive, and by reason whereof petitioner was deprived of the right to remain silent, the privilege against self-incrimination, and the right to counsel; and said trial was so infected with an absence of that fundamental fairness that is essential to the very concept of justice; and petitioner's ability to defend said charge of embezzlement was impaired.

6. That petitioner's counsel at said embezzlement trial failed to assert said defenses of denial of petitioner's constitutional and statutory rights and further failed to conduct reasonable and careful factual and legal investigations and inquiries with a view to developing matters of such defenses in order for them to have made informed decisions on petitioner's behalf at either the pleading stage or at trial which resulted in withdrawing such crucial defenses from petitioner's case and petitioner was thereby denied effective and adequate assistance of counsel.

7. By reason of the foregoing facts and allegations petitioner has been denied his right to a fair trial, due process and equal protection of the law, right to speedy trial, right to counsel, right to remain silent and privilege against self-incrimination, all as guaranteed by the Constitutions of the United States and of the State of South Dakota, and specifically the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Wherefore, petitioner prays that judgment issue vacating and setting aside the said embezzlement conviction of May 7, 1973.

Dated this 11th day of August, 1975.

MORRIS B. MYERS

State of Utah
County of Salt Lake } ss.

Morris Myers, also known as Morris B. Myers, the petitioner in the within petition, being first duly sworn, on oath, states: That he is the petitioner named in the within and foregoing petition; that he has read the same and knows the contents thereof; that all of the facts stated therein are true and petitioner knows them to be true except as to those matters stated upon information and belief and as to those matters he believes them to be true.

MORRIS B. MYERS

Subscribed and sworn to before me this 11th day of August, 1975.

CAROLYN WILSON
Notary Public, Utah
Resident at Salt Lake City, Utah

APPENDIX "B"

(DEFENDANT'S EXHIBIT B)

Circuit Court of South Dakota
Third Judicial Circuit
Brookings, South Dakota 57006
Telephone (605) 692-7328

Chambers of
Lyle E. Cheever
Circuit Judge

Jerome B. Johnson
Court Reporter

April 1, 1976

Memorandum Opinion

Mr. Morris Myers
1395 Chandler Drive
Salt Lake City, Utah 84103

and

The Honorable William Janklow
Attorney General
State Capitol Building
Pierre, South Dakota 57501

Attention: Mr. Mettler

Re: Morris Myers, Plaintiff and Petitioner

vs.

State of South Dakota, Defendant and Respondent

Gentlemen:

The Petitioner was convicted of the crime of embezzlement on May 7, 1973, upon a verdict of a jury. He subsequently ap-

pealed this conviction to the Supreme Court of South Dakota and the conviction was upheld. The Petitioner was sentenced to serve two years in the State Penitentiary and after the Supreme Court affirmed the conviction, he was committed to the State Penitentiary and completed his sentence.

He has filed this proceedings under the post-conviction review, Chapter 23-52 SDCL 1967. In his Petition, he has alleged four (4) separate grounds for post-conviction relief which may be summarized as follows: (1) That the Judgment and Sentence was imposed in violation of the Constitution and laws of the United States and of the State of South Dakota. (2) That in another proceedings which was for the revocation of the Petitioner's license to practice law, a hearing was held concerning facts and circumstances identical to those upon which his criminal trial was based, and he has alleged that at the time of such hearing that neither he nor his attorneys knew that a criminal charge was being filed and that he took the witness stand in connection with such disbarment proceedings without a cautionary warning that he had the right to remain silent and that such testimony was used against him in the trial upon the criminal charge of embezzlement and that he did not knowingly and voluntarily waive his right and privileges in the disbarment proceedings. (3) That the delay in the trial of the embezzlement charge was effected by the State of South Dakota intentionally and purposely for the purpose of obtaining tactical advantage in trapping him and (4) That his counsel at the embezzlement trial failed to assert his constitutional and statutory rights and he was therefore denied adequate assistance of counsel in such trial.

An evidentiary hearing was scheduled on such Petition and heard by the Court on December 17 and 18, 1975. At the hearing, the Petitioner called the Honorable H. O. Lund, formerly a Circuit Judge, who presided at the trial and interrogated him concerning various phases of the trial, the evidence offered thereat, and the general conduct of the trial.

The Petitioner also took the witness stand and testified briefly. During the hearing, six exhibits were offered and received in evidence. Exhibit No. 1 being a letter from Judge George W. Wuest, the Referee who presided at the Petitioner's disbarment proceeding, scheduling the hearing for October 31, 1972. Exhibit No. 2 being a phone memorandum from Judge Wuest to Stan Siegel, one of the attorneys who represented Petitioner in the disbarment proceeding. Exhibit No. 3 being a stipulation entered into between the Petitioner and the Attorney General's office stipulating that Exhibit A and B, being two (2) United States Treasury Department regulation circulars, to be received in evidence and these were made a part of the file. Exhibit No. 4 being a check from Morris Myers to Jerry Robinson dated April 15, 1968, in the amount of Five Thousand Dollars (\$5,000.00). Exhibit No. 5 being a transcript of the testimony offered in the disbarment proceedings and Exhibit No. 6 being an Order of the Supreme Court of the State of South Dakota, dated May 18, 1973, disbarring the Petitioner from practice of Law in the State of South Dakota.

Both parties have submitted Briefs, the last Brief having been received from the Petitioner on March 29, 1976. The Court has given consideration to the Briefs submitted by the parties hereto.

In connection with Point No. 1 of the Petition herein, basically it is the Petitioner's contention therein that the conviction was obtained without relevant evidence that the money involved came into his possession by virtue of an attorney-client relationship or that he converted or misappropriated the money. It is his contention that under the circumstances presented that the money came into his possession, not as an attorney, but as a borrower from the bank and that the Petitioner became a debtor of the bank and could not be guilty of embezzlement of money that belonged to him.

In the Appeal in this case, a report of which can be found in 220 NW 2d 535, one of the Assignments of Error raised

by the Defendant-Petitioner in that case was the following: "Does the record support the conviction of the Defendant of the act and intent necessary to constitute embezzlement?" In connection therewith, the Court, at Page 537, made the following statement:

"The section defining the embezzlement charged here is covered by SDCL 22-38-3, and whether or not the acts of the Defendant were sufficient to come within the purview of that particular section is largely a fact question. Fact issues are peculiarly within the province of the jury. Here there were two different versions of those acts. The State gave its version and the Defendant gave his. It appears that the jury accepted that given by the State and rejected that given by the Defendant."

The Appellate Court decision at Page 327, summarizes the facts developed at the trial of the case and the Court feels that it would be repetitious for me to repeat them as set forth in that decision.

In post-conviction proceedings, the Petitioner has developed no new factual situation but has suggested in his Brief that as a matter of law he could not be held to be guilty of embezzlement under the facts given and testified to in the trial, even accepting the State's version. The position of a Judge in reviewing under post-conviction relief, is not entirely clear. This is a relatively new act, the ramifications of which have not been fully developed by decisions. Our Court, however, said that in the case of *State v. Roth* (1969, 84 SD 44, 166 NW 2d 564):

"A post-conviction proceedings is not a re-trial by the Court of the issues which the jury determined, nor is it a substitute for remedy of direct review of the trial."

The Court fails to see where the Petitioner here has raised anything except an issue of law which was developed, both at the trial and on review by the Supreme Court. The purported issues

of law would depend entirely on what interpretations this Court would place on the evidence, as the Court said in the Appeal of this case. It is not a law issue. It is a fact issue that was decided by the jury against the Defendant and in the Appeal, the Court upheld the jury's decision and said that the conviction was justified by the facts. It is, therefore, the Court's opinion that the Defendant has failed to sustain the burden on Point No. 1 of his Petition.

As to Point No. 2 of the Petition, wherein he claimed that his rights to remain silent were violated by his testifying in the disbarment proceedings. It was originally the Petitioner's contention that the disbarment proceedings were instituted and the hearing held prior to the time that he was arraigned on the embezzlement charge. At the opening of the hearing on the post-conviction relief, he admitted that he had been arraigned approximately thirty days prior to the time of the evidentiary hearing on the disbarment proceedings and that prior to the evidentiary hearing that he had retained Mr. Joe Butler and Mr. Ellsworth Evans as attorneys to represent him in connection with such criminal proceedings. At the evidentiary hearing on the disbarment proceedings, he was represented by Mr. Warren W. May of Pierre, South Dakota, and Stanley E. Siegel of Aberdeen, South Dakota. During the course of the evidentiary hearing, the Defendant voluntarily took the witness stand and testified on his own behalf. He now contends that by testifying on his own behalf without being warned that he had the right to remain silent, violated his constitutional rights and that the evidence obtained from his testimony was used against him in the criminal proceedings.

A review of the record of the criminal proceedings, indicates that at one point and one point alone, was the record of the evidentiary hearing at the disbarment proceedings referred to in the trial. On cross-examination of the Defendant, after he had voluntarily taken the witness stand, he was asked by the prosecuting attorney whether or not a question had been asked

and whether or not he had given a particular answer. The question and answer were rather innocuous in their context. They were not incriminating of the Defendant and the Court fails to find that there was any error involved in permitting this to be done.

It appears that the Defendant has attempted in his Brief to distort the meaning of the Miranda Warning; that he has misconstrued it and attempted to apply it to the situation involved here.

Basically the thrust of the Miranda Warning is that any admissions or confessions which are obtained in an in-custody interrogation of a Defendant without advising him of his constitutional rights or his right to have an attorney present during the period of questioning shall not be admissible against him in a criminal matter. That is not the situation that we have involved here. The Defendant voluntarily took the witness stand in his own behalf in a civil proceedings involving the question of whether or not his license to practice Law should be revoked. He was not in custody. He was represented by two (2) able, competent counsel, although they were not the attorneys he had retained to represent him in the criminal matter. The Defendant, an attorney himself, one who had defended many criminal cases, was well aware of the fact that a criminal proceeding was pending against him arising out of similar facts. He testified concerning his version of the factual situation which ultimately resulted in his conviction for embezzlement. His testimony was no different than that he presented at the time of the criminal trial.

It is therefore my opinion that this contention on the part of the Defendant is completely without merit.

As to Point No. 3 in Plaintiff's Petition in which he contends that the delay in the prosecution of the criminal case resulted in an unfair advantage, the Court finds it difficult to believe

that where an indictment was handed down approximately the 1st of October of 1972, and the trial was held in May of 1973, that this is an unreasonable delay. Part of the delay was caused by the fact that the Defendant requested a Change of Venue from Brown County because of the fact that he contended that he could not obtain a fair trial and the venue was thereafter changed to Brookings County, and he was tried in the first Term of Court after such transfer. Actually, only approximately eight months elapsed from the time of his indictment to the time of his trial and conviction.

As to Point No. 4 being his contention that he was not adequately represented by counsel, I believe the Court can take judicial notice of the fact that Mr. Joe Butler and Mr. Ellsworth Evans are recognized in the State of South Dakota as being two very outstanding trial lawyers. During the evidence which was introduced during the course of the post-conviction relief, and in interrogating the Trial Judge, the Defendant attempted to bring out several areas in which he felt that the trial tactics on the part of his counsel had not been properly done and during his own testimony, he indicated that in many areas during the course of the trial that he had not been consulted concerning various matters, tactical and otherwise.

The mere fact that the Defendant may disagree with his counsel, is not sufficient to show that he did not have adequate representation. There is no other evidence, nothing in the record which would indicate that the attorneys did not vigorously defend the Defendant. The fact that their defense was not successful, certainly is no evidence of the fact that they did not adequately represent him during the course of the trial.

In conclusion, it is the Court's opinion that the Petitioner here has not established any basis for relief under the post-conviction proceeding and the Petition is therefore denied.

The Office of the Attorney General may prepare and submit to the Court, Findings of Fact and Conclusions of Law in accord-

ance with this opinion, together with an Order denying the Petitioner's Petition.

The Court further feels that the Defendant has not demonstrated that there is any merit to any of his contentions and in accordance with the provisions of 23-52-16, the Court does not believe that there is any probable cause for a review of this proceedings by the Supreme Court of this State and the Court does hereby refuse to issue a Certificate of Probable Cause.

Very truly yours,

/s/ LYLE E. CHEEVER
Circuit Court Judge

LEC:jj

APPENDIX "C"

(Defendant's Exhibit C)

In the Supreme Court of the State of South Dakota

In the Matter of the Application of Morris B. Myers
for Certificate of Probable Cause

Order Denying Application for Certificate of Probable Cause

Application having been made to a Judge of the Supreme Court of South Dakota for issuance of a certificate of probable cause to review a final judgment of the Circuit Court of Brookings County, South Dakota, denying post-conviction relief to petitioner, Morris B. Myers, and it appearing

From all the records and files herein that petitioner was convicted of the crime of embezzlement on May 7, 1973, in the Circuit Court of Brookings County, and thereafter his appeal to the Supreme Court of South Dakota resulted in affirmance of the trial court judgment. The opinion of the Supreme Court is referred to and by such reference adopted herein as fully as if set forth at length. *State v. Myers*, 220 N.W.2d 535.

It further appearing that the basis of petitioner's application herein is that the State failed to introduce relevant evidence on any material element of the crime charged and failed to prove a prima facie case against petitioner which denied him due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States, and

The foregoing application File No. 11304 having been referred to Fred R. Winans, Justice of the Supreme Court of South Dakota, by the Chief Justice of said Court,

It appears to said Justice that petitioner's claim that he has been denied due process is based upon his allegations that at the termination of the State's presentation of its evidence there was a failure on the part of the State to establish each and every material element of the crime charged.

The petitioner states that the State failed to introduce enough relevant evidence to support his conviction and suggests that the Constitution mandates that if the State fails in this respect then the missing evidence cannot be supplied by the defendant himself. He also states or infers that if a motion for a directed verdict had been made at the end of the State's case-in-chief, the trial court would have had to grant it.

It appears to the referral Justice that the South Dakota cases definitely hold that it is not reversible error to fail to grant a motion for a directed verdict at the end of the State's case-in-chief on the grounds of insufficiency of evidence when that evidence is introduced later by the defendant. *State v. Olson*, 161 N.W.2d 858; *State v. Zemina*, 206 N.W.2d 819, 823. Review will be of the entire record. In *State v. Myers*, *supra*, assignments of error 1 and 4 set forth the following question: "Q. Does the record support the conviction of defendant of the act and intent necessary to constitute embezzlement?" And the holding of this Court was that it did. In the Myers case assignment 4 reads as follows: "The Court erred in denying the defendant's motion for a directed verdict of acquittal for all the reasons stated in the motion for directed verdict of acquittal made at the close of all of the evidence." The holding of this Court was "If Mrs. Zick was correct in her testimony, if the banker was correct in his, then the defendant was wrong in certain crucial aspects of his. There was at least a prima facie case made by the state 'and the jury, not the judge, ought to pass upon it.'"

It appearing further to the undersigned Justice that the application is entirely without merit, that the issues which peti-

tioner presents were presented to the lower court at trial and to this court on appeal. Further, that the application is simply an attempt to relitigate what has already been litigated and decided by the circuit court and this court on appeal. It is, therefore,

Ordered that the application of the said Morris Myers for issuance of a certificate of probable cause fails for lack of an appealable issue and is hereby denied.

Dated at Pierre, South Dakota, this 14th day of May, 1976.

Fred R. Winans
Justice of the South Dakota
Supreme Court

Attest:

Lyman A. Melby
Clerk of the Supreme Court
